

ARKANSAS COURT OF APPEALS
JUDGE DAVID M. GLOVER
NOT DESIGNATED FOR PUBLICATION

DIVISION III

CA06-486

January 31, 2007

MICHELLE CHRISTINE ARCHER
APPELLANT

V.

KIRBY LOGAN ARCHER
APPELLEE

APPEAL FROM THE
INDEPENDENCE COUNTY
CIRCUIT COURT [DR-05-117-4]

HONORABLE TIMOTHY M.
WEAVER, JUDGE

AFFIRMED

Michelle and Kirby Archer were married on September 26, 1998. Two children were born of this marriage, T.J. (DOB 9-4-1999) and Michael (DOB 7-27-2000). Michelle Archer filed for divorce on March 8, 2005, and a final hearing was held on June 9, 2005. On October 6, 2005, the trial court awarded custody of the parties' children to Kirby Archer. Michelle Archer now appeals, arguing that the trial court erred in granting custody to Kirby because that decision was based on Kirby's support system and not on the best interests of the children. We affirm.

At the hearing, Michelle testified that she was a security officer at Pilgrim's Pride and had been employed in that position since December 2003. She said that she separated from Kirby because she was unhappy and he "did not treat her right." Michelle explained

that they moved to Arkansas in December 2003 because Kirby was AWOL from the military and did not want his family to know. She acknowledged that prior to moving to Arkansas, she had what she termed an “accidental overdose” on migraine-headache medication and had to be taken to the hospital and have her stomach pumped; she denied that the overdose was a suicide attempt.

Michelle stated that she had been the boys’ primary caretaker since they were born, feeding them, getting up in the night with them, bathing them, and taking them to doctor appointments. She said that she was the class mom and helped organize class parties and field trips. She said that Kirby, in his job as an investigator, was gone more than he was home, and that she had stayed at home with the boys until she and Kirby separated, at which time she began working. She said that after they first separated, she and Kirby would compare work schedules and whoever was not working had the kids.

Michelle said that she did not think it was appropriate for Kirby’s girlfriend, whom Kirby had told her was living with him, to keep the boys by herself. Michelle said that she paid for daycare for the boys for the times that she could not keep them, and that she did not have the extended family Kirby had in the area.

Michelle admitted that she had been involved in a lesbian relationship with Jessica Halcomb after she and Kirby separated, but that she did not want to be a part of the relationship because Jessica was an alcoholic and into drugs. She said that Jessica worked with Kirby, and that Kirby would drop her off at Jessica’s house with the boys when he would go out to clubs so that she would not be alone. She said that Kirby would

tell her to just spend the night at Jessica's house when he would drop her off and go out. Michelle said that when she and Kirby separated, she did not have anywhere to go, so she went to Jessica's house with the boys. However, she said that she now lived in a two-bedroom duplex with the boys.

Michelle complained that one time T.J. came home from Kirby's with hot pink nail polish on his toes and that Michael had on clear nail polish. When she asked Kirby about it, he laughed and said that his girlfriend's daughter had painted their toenails and that it did not hurt anything. Michelle said that T.J. was embarrassed and that she did not think it was appropriate.

Michelle testified that during her lesbian relationship with Jessica, Kirby was in a homosexual relationship with a man named Greg, and that Kirby was also with five or six other gay men during that time. She said that she had seen Kirby "make out" with Greg while the boys were present, and that she would tell him to stop. She also said that Greg would be naked in the bed sometimes when she went to pick up the boys, and that she would shut the bedroom door so the boys would not see him. She also said that Kirby had a relationship with a boy who was still in high school, and that one of Kirby's co-workers, Dan Pond, was gay and that Kirby would frequently spend the night at Pond's house, where five other gay men also resided. Michelle said that Kirby told her that he had been gay his entire life and that he just wanted to have a family.

Michelle stated that when she told Kirby she wanted a divorce, he got angry and threw her into a chair and then into a wall, hurting her back. She also recounted an

instance where he threw her off the couch and “messed up” her elbow, but that because Kirby was an investigator, she could not tell the doctor what had really happened, so she just told him that she fell off the couch because Kirby coerced her into saying that. Michelle also alleged that Kirby’s father forced himself on her and attempted to have oral sex with her.

Michelle said that she thought it was best for her to have custody of the boys because they were her whole life; that she had been there for them since the day they were born; and that she was a good mother. She said that in the early years, Kirby was never home, and although he would play with the boys, he was not the one who was up in the middle of the night with them. She said that now, Kirby always has help with the boys from his mother, his aunt, and his girlfriend.

On cross-examination, Michelle testified that Kirby said that he was straight now, but that his sexual preference did not matter to her because he was the boys’ father and could love them the same. Knowing that he had a girlfriend, she said that as long as Kirby was with the kids, it was okay, but that she did not like his girlfriend to watch the boys by herself. She said that Kirby’s mother and his Aunt Paulette were appropriate caregivers, but that she had a problem with the girlfriend. She said that when she lived with Jessica, most of the time she would not let Jessica watch the boys by herself. Michelle said that she and Kirby had agreed that they would not have the boys around anyone with whom they were involved because it was not appropriate.

Michelle denied that she refused opportunities to have the boys; instead, she said that she was told that she could not have the boys until they went to court. She said that she had the boys every chance she could get them. She also admitted that when she had her accidental overdose, she had one or two shots of tequila, but that the doctor had not told her that she could not have alcohol, and it was not on the medication bottle.

Michelle said that Kirby gave her a black eye in March 2004, but that she had never seen him be mean to the kids. She also reiterated that his father had tried to force oral sex on her before he was in an accident, that she had told Kirby about it, and that Kirby had told her that he would take care of it. She again acknowledged that Kirby had a family support system in the area, and she said that even though she did not have that family support here, she did have friends. She said that she had no plans to return to Virginia, where her family resided, but that if things got too difficult, it might be a possibility. She testified that the boys asked her not to let them go to their dad's house because he was mean. She also said that she had asked Kirby's mother to babysit if she had to go to the doctor or go to work.

Sheila Reynolds testified that she knew Michelle Archer and that she was at Michelle's house quite often. She said that Michelle was a good housekeeper; that she worked hard; that she was a good mom; that she was very loving with her children; and that she always played with the boys and had a great time with them. Reynolds said that she had never known Michelle to return the boys early or say that she did not want to spend time with them. She said that Michelle was morally fit to have the boys and that

she was instilling good morals in the boys. Reynolds said that she had never seen a man spend the night at Michelle's house, even if she did not have the boys, and that she had never heard Michelle talk bad about Kirby in front of the boys.

Denise Riley testified that she was a co-worker of Michelle's and that she had spent time at Michelle's house and had observed her interaction with her boys. Riley said that Michelle was always playing with the boys and described her as "an awesome mother." Riley said that Michelle's house was always clean, and that she had never seen alcohol of any kind in Michelle's home. Riley also testified that she had witnessed a conversation in which Kirby denied Michelle visitation with the boys. On cross-examination, Riley said that Michelle had never badmouthed Kirby in front of the kids, but she had not said anything good about Kirby to her.

Paulette Sutton, Kirby's aunt, testified that she went to Oklahoma in 2003 to help with the boys because Michelle was not well enough to take care of the boys due to a suicide attempt. Sutton said that at the time she went to Oklahoma, the boys were living with their father and would visit Michelle. She said that at first, Michelle and Kirby would alternate having the boys for two weeks, but that she ended up having them all of the time because she was the babysitter for both Michelle and Kirby. Sutton said that Kirby was a hands-on dad, and that when he moved to Arkansas, he had the boys with him, although she did not know why he moved. Sutton stated that it was her opinion that it was in the boys' best interests to stay with Kirby because Michelle was wrapped up in her work and wanted the boys in daycare, and daycare was not for kids.

On cross-examination, Sutton said that Michelle would bring the boys back early two or three times per week, but that Kirby never took the boys back to Michelle early. Sutton expressed concern over Michelle's lesbian affair, saying that she did not think it was right. She denied any knowledge of Kirby having a gay affair, saying that he had a girlfriend who was frequently at his home. Sutton said that to her knowledge, Kirby's girlfriend had not stayed overnight at his house. Sutton said that the boys loved Michelle, and that she was not an unfit mother, but that she did not think that Michelle was stable enough to watch the boys.

Betty Archer, Kirby's mother, testified that she and her husband owned a store in Gainsboro, Arkansas, and that when Kirby moved to Arkansas from Oklahoma, he moved into her house. She said that she and her husband, who had been partially paralyzed in a truck accident, lived in a trailer that was next to their store. Archer said that she was not at the house with Kirby and the children very often because she was either at the store or driving a truck for extra income, but that the last time she was there, it was spotless and everything was in order. She said that when Kirby and Michelle lived together, the house had been a total disaster; that she did the family's laundry; that she or Kirby had done the cooking; and that she had never seen Michelle cook a meal. Archer said that they all took care of the kids, although Archer recounted that Michelle would not fix the boys' meals, even going so far as to sit down and eat in front of them after they had told her they were hungry. She said that Michelle would bring the boys to the store and leave them almost everyday, and she would take them home with her at closing time. Archer said that Kirby

had the boys most of the time and that Michelle did not want the boys for an extended period of time until she filed for divorce, and then she wanted to have them everyday. Archer said that she heard Michelle on several occasions turn down time with the boys. Archer testified that she knew Michelle loved the boys and would never take them away from her, but she did not think that Michelle was capable of providing a stable and loving home for the boys like Kirby could provide.

On cross-examination, Archer commented that her brain “doesn’t work half the time.” Archer said that she knew Michelle Braun, Kirby’s girlfriend, and that Ms. Braun did not live with Kirby, although Archer did not know if she spent the night on occasion. Archer said that she thought it was okay for Kirby to have his girlfriend around the boys because although he was still married, he had not had a wife for a year. Archer admitted that Kirby had been married once before and had not told her anything about the marriage or divorce until he had married Michelle; that she still did not know about it; and that she did not know if there were other things about the kids that Kirby had not told her.

Kirby testified that his girlfriend did not live with him, but that they planned to get married, although they had not set a date. He said that when he decided to get out of the military, his first sergeant told him that he could get out quickly by going AWOL and then thirty days later he would be “dropped from rolls.” Kirby testified that he received an other-than-honorable discharge, but that it was the best move at the time because of his children.

Kirby said that he and Michelle separated in January 2003, and that Michelle ended up in a lesbian relationship with one of his co-workers. He denied that he was gay, that he had ever been gay, or that he had ever told Michelle that he was gay. He also denied that he had ever laid a hand on Michelle or caused her any injuries.

On cross-examination, Kirby reiterated that his girlfriend was not living with him. He admitted that she had three children with three different men, but he said that his boys got along well with her children. He acknowledged that he was AWOL from the Army and had received an other-than-honorable discharge, but stated that he was not court-martialed, although he did sacrifice military benefits due to the manner in which he left the Army. He again denied that he had ever been in a homosexual relationship; he said that Greg had been his roommate, although he could not remember Greg's last name. He said that Michelle was making up her testimony about him being gay to counter her own lesbian affair. He thought it was appropriate for his girlfriend to be around his kids even though he was still married because he did not do anything "inappropriate." He said that his girlfriend had spent the night at his house, but she was not living there. He also admitted that he had been named as the father of his niece's child on the birth certificate, but he denied that he was the father, saying that the niece was just infatuated with him.

Michelle Archer testified on rebuttal that the only time she told Kirby that she did not want the kids was when she hurt her back because she did not want the boys around her while she was on pain medication. She said that she had never told Kirby's mother that she was a lesbian, and that even though she had been in a lesbian relationship, she

was not proud of it, she regretted it, and that she would never do it again. She said that she had never taken any illegal drugs and that she was not an alcoholic. She said that she could provide the stability the boys needed and could take care of them.

The trial court reserved its decision after the June hearing, and a hearing was set for October 6, 2005. At the October hearing, the trial judge stated, "I didn't like either of the parents or their conduct. I find both of their conduct is less than in the best interest of these children. However, in light of the fact that Mr. Archer does have something of a support system in this community, or close to the community or in this area that Ms. Archer does not have, that has been the swaying factor in my decision. I am going to grant custody of the children to Mr. Archer subject to standard visitation by Ms. Archer." Michelle Archer was not present at that hearing, as she had been hospitalized two days before for the delivery of her baby. Later that afternoon, the trial judge went back on the record in the case, with Michelle's counsel stating that after the matter had been heard that morning and the court had granted custody to Kirby, Kirby went to Michelle's hospital room and announced that he had gotten custody of the boys, causing Michelle to become visibly upset. Counsel said that Michelle asked him to leave, but he would not leave until another gentleman went to the nurse's station for help, at which time he left.

Kirby testified that he was planning to go to the hospital that day anyway, but that there was no incident. He denied gloating about getting custody of the boys, and he said that he only went because Michelle was there alone. He testified he also took his girlfriend to the hospital as well, which he did not think would upset Michelle. Kirby said

that it was not his intention to go up there and announce the custody decision because he knew that it would upset her; he said that he tried to avoid it, but that Michelle was already upset when she asked him about the custody decision. He again denied that he was gloating about the custody order when he went to the hospital; he said that he went out of concern for his ex-wife and the mother of his children. He also said that he left the first time she asked him to leave.

Michelle Braun, Kirby's girlfriend, testified that she was now engaged to Kirby and had accompanied him to the hospital to see Michelle. She said that Michelle was emotional because she could not feel her legs and asked them to leave, which they did. Braun said that she was now living with Kirby and had been living with him for the last couple of months, but that she had not lived with him before that time.

In the divorce decree, the trial judge stated, "The Court did not approve of the conduct of the parties, however, due to Defendant's [Kirby Archer's] support system, custody is granted to him."

Domestic relations cases are tried *de novo* on appeal, and the circuit court's findings will not be disturbed on appeal unless they are clearly against the preponderance of the evidence; the best interest of the children is the polestar for making judicial determinations regarding custody. *Buckley v. Buckley*, 73 Ark. App. 410, 43 S.W.3d 212 (2001). In *Tillery v. Evans*, 67 Ark. App. 43, 46, 991 S.W.2d 644, 646 (1999), this court stated, "We indulge in the presumption that the trial court acted properly and made the findings necessary to support its judgment." Although the trial judge's comments

indicated that he did not think that the conduct of either party was beneficial to the children, we hold that he did consider the best interests of the children for purposes of custody when he considered the familial-support system that Kirby had for taking care of the children. While we agree with the trial court that the conduct of both parties has been less than stellar, and in some cases reprehensible, we cannot say that the trial court's decision to grant custody to Kirby is clearly against the preponderance of the evidence.

Affirmed.

ROBBINS and MILLER, JJ., agree.